Study B-700 September 27, 1995

Third Supplement to Memorandum 95-43

Unfair Competition: Draft of Tentative Recommendation (Comments from CDAA and others)

Attached to this supplement are three letters commenting on the staff draft statute in Memorandum 95-43. The letters are reproduced in the Exhibit:

At the meeting, the staff will draw the Commission's attention to the points made in these letters as the Commission reviews the draft statute. A brief overview is presented below, along with a limited amount of staff commentary.

CDAA Letter (Exhibit pp. 1-10)

Relation of public to private actions. The CDAA letter analogizes actions by public prosecutors in the unfair competition area to criminal prosecutions and concludes, consistently, that private actions for restitution should be given the same subordinate status given actions for restitution by victims of criminal acts. (See Exhibit pp. 2-6 *passim*.) This argument makes sense in the abstract, but the staff is not clear that the analogy applies with equal force to civil enforcement and particularly with regard to actions for restitution on behalf of the injured class, the same injured class that the private plaintiff seeks restitution for in the form of an action on behalf of the general public. As we know, the public prosecutor's interests are not necessarily the same as the interests of the injured class entitled to restitution. This is not a simple issue, but if possible, the staff would like to focus on the overlap in representation of the injured class with respect to restitution. Perhaps the resolution of the issues raised by CDAA will come from refining the statute to apply to restitution. (This approach is not without risks, however, since if special burdens are placed on public prosecutors seeking restitution, the statute could create pressure to seek civil penalties instead of restitution.)

Draft Section 385.10(d). Definition of "representative cause of action." This definition should apply to both public and private plaintiffs. The CDAA would limit this definition to private parties. (See Exhibit pp. 2-3, 8.) The staff note to draft Section 385.20 on page 2 of the draft statute recognized the technical problem in that public prosecutors bring actions "in the name of the people of the State of California." The section does need work to clarify its application. If the Commission adopts the approach suggested in the draft statute, then the staff suggests revising this definition as follows:

> (d) "Representative cause of action" means a cause of action on behalf of the general public under Section 17204 or 17535 of the Business and Professions Code, and includes a cause of action brought by a public prosecutor.

This definition would avoid limiting the term where it is intended to apply to both public and private plaintiffs. Where a provision in the draft statute is limited to private plaintiffs, the specific section so provides.

Draft Section 385.34. Binding effect of representative action. The CDAA would limit the binding effect of a prior representative action to later actions brought by *private* plaintiffs. (See Exhibit 3-5, 9.) This proposal is part of the general approach of giving public prosecutor actions a higher status than representative actions by private plaintiffs, based in part on the broader relief available in public prosecutor actions.

Draft Section 385.40. Priority between public prosecutor and private plaintiff. The CDAA argues for a higher priority for public prosecutors than is provided in the draft section. (See Exhibit pp. 5-7.) CDAA proposes that private actions be stayed upon application of a public prosecutor until conclusion of the public action.

Letter from Jan T. Chilton (Exhibit pp. 11-15)

Mr. Chilton finds the draft to be an improvement over prior proposals and makes quite a few suggestions for clarification and supplementation:

(1) "Adequate legal representative" and "conflict of interest" in draft Section 385.22 should be clarified to provide needed guidance to the courts. Is discovery available on these issues? (Exhibit p. 11-12, item 2a-c.)

(2) Should the statute provide for tolling of individual claims while the representative action is pending? (Exhibit p. 12, item 2d.)

(3) Clarify that the statute no longer applies once an action is no longer a "representative action." (Exhibit p. 12, item 3.)

(4) What rules should apply to appellate review? (Exhibit p. 13, item 4.) The staff believes this is worth clarifying in the statute.

(5) Specify whether plaintiff can obtain ruling on merits before preconditions to representative action are established. (Exhibit p. 13, item 5.) The staff believes this is worth clarifying in the statute.

(6) Statutory notices should be coordinated with other statutes. (Exhibit p. 13, item 6.) This can probably be handled in by language in the Comment.

(7) Public prosecutors should be required to file similar notices to avoid duplicate filings and inform the public, and should be subject to the same findings requirements. (Exhibit p. 13-14, items 7 & 9.)

(8) Don't apply notice and findings requirements where judgment entered after a trial. (Exhibit p. 14, item 8.) The staff does not believe this would be consistent with the intent of the statute. A trial is not a guarantee that the representative action standards will be met. Perhaps if the case goes to trial, the notice should be given to interested parties at that time, instead of 45 days before entry, as provided in the draft.

(9) Even the playing field by precluding individuals from claiming benefits of collateral estoppel arising from the representative action. (Exhibit p. 14, item 10.) The staff believes this is counter to existing case law, although that does not prevent adopting the suggested approach as a statutory rule. Mr. Chilton would keep some version of the res judicata rule. (Exhibit p. 15, postscript.)

(10) Delete the special res judicata rule in Section 385.36. (Exhibit p. 14, item 11.)

(11) Mr. Chilton finds that draft Section 385.40 "unduly favors public prosecutors." (Exhibit p. 14-15, item 12.)

(12) Coordinate the language of Section 385.42 with Code of Civil Procedure Section 1021.5. (Exhibit p. 15, item 13.) The staff agrees that more work needs to be done in this vein. Mr. Chilton disagrees with the policy of this section and would erect greater hurdles to attorney's fees awards.

Letter from S. Chandler Visher (Exhibit pp. 16-18)

Mr. Visher raises a number of issues and suggests several revisions:

(1) Coordinate cases involving public-private conflict by limiting the private plaintiff's interest to the restitution issue, rather than staying the private representative action. (Exhibit p. 16.)

(2) Provisions on notice and required findings are cumbersome and "should be optional when one of the parties wants the preclusive effect they provide." (Exhibit p. 17.)

(3) The requirement that the defendant give notice of similar actions should be expanded to cover new cases filed after the instant case, not just cases pending when the notice is first required to be given. (Exhibit p. 17.)

(4) Like Mr. Chilton, Mr. Visher suggests adopting class action standards for adequate legal representatives. (Exhibit p. 18.)

(5) If the stay provision is mandatory, then the rule on binding effect should apply to public prosecutor cases only if "there has been an order of restitution and the court has made a finding that a private action seeking damages and restitution would likely not have obtained more restitution damages for the class." (Exhibit p. 18.)

(6) Mr. Visher has doubts that the proposed register will be effectively maintained unless it is limited to larger cases. (Exhibit p. 18.)

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

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September 23, 1995

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Re: Study B-700 -- Unfair Competition

Dear Chairperson Wied, Mr. Ulrich and Members:

I write once again on behalf of the California District Attorneys Association Consumer Protection Committee, as well as my own office, to provide further information on the views of public enforcement officials regarding the Commission staff's September 8 draft tentative recommendation on the unfair competition statute. The views of dozens of district attorneys, city attorneys and deputy attorneys general in our membership are incorporated here.

Once again we thank the Commission and staff for your kind consideration of the views of the law enforcement community in this regard. We have a consensus on a few proposed amendments to the September 8 draft, and these follow.

Background to Proposed Amendments

Changes to the unfair competition statute are of vital concern to every California prosecutor's office. More than simply another private remedy, Bus. & Prof. Section 17200 is California's "Little FTC Act" -- the principal law enforcement tool used by California prosecutors to protect the public from unfair and deceptive business practices. See People v. National Association of Realtors (1981) 120 Cal.App.3d 459; People v. Pacific Land Research (1977) 21 Cal.3d 683.

In consumer fraud and antitrust enforcement, Section 17200 is more important to us than the Penal Code. We appreciate your efforts to avoid hampering legitimate law enforcement uses of this statute, which has served California so well over the years.

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As we indicated in our letter of June 28, the issue of standing to represent the "general public" (see Section 17204), and the related issue of finality in the context of public and private litigation, merit the attention of the Commission, even though problems in this area arise infrequently. We believe this clarification can be achieved through careful draftsmanship, and we applaud the efforts of the staff in this regard. The September 8 Staff Draft Tentative Recommendation greatly advances the discussion and we agree with much of its approach.

However, we believe it is important to distinguish more clearly between public law enforcement actions -- which are brought in the name of the People of the State of California -- and private actions brought by private persons acting on behalf of themselves and the "general public."

Law enforcement actions under Section 17200 are brought by the State of California in its sovereign capacity; these actions serve many of the same functions (including deterrence, punishment and restitution) as criminal prosecutions under the Penal Code.

Private actions under Section 17200 take two forms: Some such suits are brought by a single plaintiff to obtain an injunction or recovery for the plaintiff's individual loss. Others -- the "general public" actions the staff has titled "representative actions" -- seek injunctions and restitution for many individuals.

The vast majority of the cases which have caused concern are the private "follow-on" lawsuits on behalf of the "general public," usually following public actions that defendants hoped would be conclusive. On the other hand, we are unable to identify a single case of a "follow-on" law enforcement action impeding a legitimate private action on behalf of the general public. Indeed, public prosecutors essentially never spend scarce resources by challenging a practice that has already been litigated and stopped. Although we address that possibility in our proposal, the difference in the pattern of problems here is yet another reason for different treatment of the public and private actions.

There are three aspects of the current draft recommendation for which we would suggest amendments: (1) the definition of "representative action," (2) the res judicata provision, and (3) the public/private priority provision.

Defining "Representative Action"

The present draft defines the term "representative action" which is key throughout the balance of the text. "Representative action" means "a cause of action on behalf of the general public

under Section 17204 or 17535" (Section 385.10(d).) This definition may cause confusion for those not familiar with the distinction between these "general public" actions and actions brought in the name of the People by prosecutors.

California public prosecutors do not bring "representative actions" as the staff has defined them, or indeed at all. Rather, California prosecutors bring only law enforcement actions in the name of the sovereign, the People of the State of California, under the first clause of Section 17204 (see also Section 17206(a)). Prosecutors do not act in a "representative" capacity (in the sense meant by the staff) but only as counsel for the People as sovereign (see also Penal Code sec. 684). Thus to our knowledge prosecutors have never brought actions under the "general public" clause of Section 17204 that is the real issue before the Commission.

To be sure, injunctive relief and restitution/disgorgement can be obtained by both parties (the People and a private plaintiff acting in a representative capacity). And we are proposing means of addressing each kind of case. But to avoid potential confusion and ambiguity, it would be best to differentiate clearly between private "general public" actions and public "People" actions. This can be accomplished easily by inserting the term "private" in Sec. 385.10(d) and elsewhere, as we have proposed in the attached draft revisions.

Res Judicata Provision

The present draft recommendation includes a res judicata provision, Section 385.34 (binding effect of representative action), which declares the determination of a "representative action" to be "binding and conclusive on all persons." This proposal attempts a single rule for all public and private actions in this context, although Prof. Fellmeth recommended a two-part rule distinguishing public and private cases.

We share the staff's desire for simplicity and brevity, but the combined rule in its present form is likely to cause confusion.

If by use of "representative cause of action on behalf of the general public" the staff is proposing to bind only those actions using the "general public" standing provision of Sections 17204 and 17535, then this provision will only apply to private litigants, as prosecutors never use the "general public" standing provision. If this is so, it should be clarified.

However, if this version of Section 385.34 is intended to bind all persons -- even prosecutors bringing subsequent law enforcement actions for uniquely public sanctions -- then the proposal is a substantial deviation from sound public policy in California. Public policy in this and other states has

consistently treated law enforcement actions distinctly from private damage actions precisely because the two actions serve very different policy concerns.

This may be seen clearly by analogy. Prosecutions for grand theft under Penal Code Section 484/487.1 serve different purposes (including deterrence and punishment) than actions by private victims to recover damages for fraud on the contract or wrongful conversion. While individual private parties, as "victims" under the California Constitution (Art. I, sec. 28) and certain Penal Code provisions, have a right to restitution for losses suffered as a result of criminal activity, private attempts at that restitution are legally subordinate to the public enforcement action (and set-offs are provided for, see Penal Code Sections 1202.4(e) and (h)).

Criminal prosecutions and judgments are never stayed or barred in deference to private civil actions which might arise out of the same facts. To do so would allow private litigants, acting for their own interests, to determine when and how the People as a whole should act in their sovereign capacity to protect the public. Only the sovereign is permitted to seek penalties such as incarceration and fines, or here civil penalties under Section 17206. A private action for restitution and/or injunctive relief should not bar a public law enforcement action, especially for those public remedies (such as Section 17206 civil penalties and public agency costs) which the private action cannot obtain.

However, there is an overlap in the remedies of public and private actions under Section 17200 as to injunctive and restitutionary relief under Section 17203. Without unduly interfering with the unique prosecutorial function, there should be a means of providing finality and avoiding duplicative actions with regard to those overlapping remedies.

Where one or more private "general public" actions exist, the staff rightly suggests that one must be selected and accorded finality. And where a public enforcement action under Section 17200 has been brought and all appropriate remedies have been obtained, private defendants have a reasonable interest in knowing that the matter is likewise final.

To better serve all these legitimate policies, we propose the attached amendments to current Section 385.34. Sub-paragraphs (a) and (b) remain, but are clarified to apply as a bar only to "any action brought by a <u>private</u> person on behalf of the general public." This provides finality as to "general public" private claims -- the primary source of concern for the Commission. (As a footnote, you may also wish to change the word "damage" in sub-paragraph (b), as "damages," strictly speaking, are not recoverable under Sections 17200 or 17535 (<u>Bank of the West v. Superior Court</u> (1992) 2 Cal.4th 1254).)

However, in order to fairly address the "public/private" finality concern, we propose to add sub-paragraphs (c) and (d). This proposal provides that, where the People have already acted, two provisions apply to subsequent private "general public" actions:

- The defendant(s) have a complete defense to the substantially similar private action if the public judgment obtained appropriate injunctive and other relief;

- A rebuttable presumption of the sufficiency of the public judgment shall exist if so indicated by the court in the public judgment.

If the "general public" has already been well served by a public enforcement action, a defendant should be able to assert this as a complete defense to subsequent redundant private actions.

Thus our proposal addresses both the "private/private" and the "public/private" redundancy scenarios, and avoids problems associated with combining the two issues in one provision.

Priority Between Public Prosecutor and Private Plaintiff

The present proposal, at Section 385.40, provides for a system for establishing priority between public and private plaintiffs in cases of "conflicting claims to represent the general public." A presumption is provided in favor of the prosecutor, but this may be rebutted on showing of a specified conflict of interest or an inadequacy of "the resources and expertise" of the prosecutor.

Once again, the definition of "representative action" is important here. If this provision only applies to "general public" actions, there will never be "conflicting claims to represent the general public" as prosecutors never bring actions on that basis. But we assume this proposal was intended to establish priority for a broader class of Section 17200 claims, and the present draft poses problems for the law enforcement community.

As discussed above, law enforcement actions brought in the name of the People of the State of California (or those actions brought by any other state, or by the United States government), do not trail or yield to private actions arising out of the same conduct and events. At most in California, private plaintiffs' recoveries are off-set by restitution ordered, under the Penal Code sections cited above.

This general primacy for law enforcement actions is grounded on solid principles of public policy. The Attorney General and the local District Attorneys are Constitutional public officers, elected and periodically evaluated by all the citizenry, and forbidden by law and ethics from personal pecuniary gain from

their prosecutions. Private plaintiffs are expected to pursue such private gain on behalf of their clients and themselves, and have no such system of democratic checks and balances.

This is not to say that it is impossible for a public enforcement official to act unwisely; rather, that there is an effective system of checks to prevent such abuse. Importantly, there is no evidence of such problems in Section 17200 enforcement. No one before the Commission or elsewhere has been able to cite a case of a bad faith public prosecutor intervening to forestall a good faith private Section 17200 action. This is not merely a result of chance: The Attorney General would have to join in any such bad faith action by a local prosecutor to give the matter statewide effect; the inherent checks involved in two elected officials publicly betraying the interests of a large class of voting consumers are obvious and effective.

The public has a right to have its business take precedence. It does, for example, in the criminal enforcement process, and in the allocation of criminal and civil Superior Courts. This principle should apply to consumer fraud matters as it does to virtually all other such public/private conflicts.

In addition, the current version of Section 385.40 might give rise to serious practicality and enforceability problems. It is possible that there is a separation of powers problem in allowing a judicial branch of government to bar the executive branch of government from filing or pursuing actions to enforce otherwise valid state laws. And the proposed sub-paragraph (b)(1) is arguably duplicative of state law today (see People ex rel. Clancy v. Superior Court (1985) 39 Cal.3d 740 (prosecutors already disqualified if conflict of interest exists).

But more troubling is the comparative resources/expertise process in sub-paragraph (b)(2). This provision is unprecedented in its attempt to require a public prosecutor to justify that it is competent to enforce state law. It would seem to invite strange "law office quality pageants" where discovery as to resources and expertise would take place and then resource-intensive hearings on comparative superiority or adequacy would ensue.

Our alternative has already been reflected in the present draft at p.8, note 4. This proposal provides that in matters brought by a private party acting for the "general public," the private action shall be stayed, upon the prosecutor's application, until the final judgment is reached in the public action. This reflects the larger tradition in the Anglo-American legal system of precedence for law enforcement actions brought by elected public representatives.

Importantly, this is not a bar or estoppel provision. The private action would proceed once the public judgment is entered. Our proposal simply says: "The public's work comes first; the private interests may proceed thereafter." This sequence works well in most other areas of public/private litigation; it is unclear why we should deviate from that tradition here.

We invite your consideration of this proposal and welcome an opportunity to continue to provide input into your analysis of the important law enforcement statute. More detailed analysis of these and related issues will be provided as you might wish.

Thank you once again for your consideration of our views.

Best regards,

GIL GARCETTI
District Attorney

By Tom Papageorge

THOMAS A. PAPAGEORGE, Head Deputy
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Chair, Legislative Subcommittee, CDAA
Consumer Protection Committee

ATTACHMENT 1: PROPOSED AMENDMENTS

§385.10. Definitions

385.10. as used in this chapter:

(a) "Private plaintiff" means a person other than a public prosecutor.

(b) "Public prosecutor" means the Attorney General or appropriate district attorney, county counsel, or city prosecutor.

(c) "Representative action" means an action that includes a representative cause of action.

(d) "Representative cause of action" means a cause of action brought by a private plaintiff on behalf of the general public under Section 17204 or 17535 of the Business and Professions Code.

§385.20. Prerequisites for pleading representative cause of action

385.20. (a) A private plaintiff may plead a representative cause of action on behalf of the general public under Section 17204 or 17535 of the Business and Professions Code only if the requirements of this chapter are satisfied.

(b) The private plaintiff shall separately state the representative cause of action in the pleadings, and shall designate the cause of action as being brought "on behalf of the general public" under Section 17204 or 17535 of the Business and Professions Code, as applicable.

§385.26. Disclosure of similar cases against defendant

385.26. Promptly after a representative action is filed, the defendant shall disclose to the private plaintiff and to the court any other cases pending in this state against the defendant based on substantially similar facts and theories of liability.

§385.28. Notice of terms of judgment

385.28. (a) At lease [45] days before entry of a judgment in the representative action, or any modification of the judgment, which is a final determination of the representative cause of action, the private plaintiff shall give notice of the proposed terms of the judgment or modification, including all stipulations and associated agreements between the parties, together with notice of the time and place set for agreements between the parties, together with notice of the time and place set for the hearing on entry of the judgment or modification, to all of the following:

(1) Other parties with cases pending against the defendant based on substantially similar facts and theories of liability.

(2) The Attorney General for publication in the register of representative actions under Government Code Section 12660.

[(3) Any regulatory agency with jurisdiction over the defendant relevant to the allegations in the pleadings.]

(b) A person given notice under subdivision (a) or any other interested person may apply to the court for leave to intervene in the hearing provided by Section 385.30. Nothing in this subdivision limits any other right a person may have to intervene in the action.

§385.34. Binding effect of representative action

385.34. (a) Except as otherwise provided in subdivision (b), the determination of a representative cause of action on behalf of the general public in a judgment approved by the court pursuant to Section 385.30 in binding and conclusive ~~on all persons.~~ in any action brought by a private person on behalf of the general public.

(b) A person who commences an action based on damage to the person individually, as distinguished from a cause of action in a representative capacity is not bound by the judgment on the representative cause of action except that any monetary recovery awarded to the person individually shall be reduced by the amount of any monetary recovery the person received as a result of the representative action.

(c) It shall be a complete defense to a representative action brought by a private party that a final judgment in an action brought by a law enforcement agency was entered in another action involving substantially similar alleged facts and that the judgment provided an injunction sufficient in scope to protect the public from the recurrence of the alleged violations of law and any additional equitable relief or other orders reasonably necessary under the facts and circumstances to redress the alleged violations of law.

(d) A rebuttable presumption exists that a judgment obtained by a law enforcement agency provides the relief described in subdivision (c) if the court so indicated in the judgment. The law enforcement agency and its members may not involuntarily be called as witnesses or subject to Title 3 (commencing with Section 1985) of Part 4 of the Code of Civil Procedure in any proceeding to contest the presumption established by this subdivision.

§385.42. Attorney's fees

385.42 (a) In addition to any other applicable factors, any award of attorney's fees in a representative action shall be based on the work performed, the risk involved, and a consideration of benefit conferred on the general public.

~~(b) If a public prosecutor is given preference over a private plaintiff under Section 385.40 the private plaintiff may be~~

~~entitled to costs and attorney's fees pursuant to Section 1021.5 of other applicable law.~~

(b) Timely notice by the attorney for the private plaintiff of a planned or filed representative action ~~and assistance to the public prosecutor~~ shall be relevant in meeting the requirement of beneficial contribution under Section 1021.5. Where beneficial contribution has occurred, the private plaintiff need not have been the successful party in order to qualify for an attorney fee award under Section 1021.5.

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September 26, 1995

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Re: **Unfair Competition Study B-700**

Dear Mr. Sterling:

Thank you for sending me a copy of the latest draft of the proposed statute concerning unfair competition litigation. Will Stern and I have reviewed it and have the following comments:

1. The draft is a great improvement over prior proposals. The idea of splitting res judicata effects as to the general public from those affecting the right to individual recovery is a good, innovative solution to a difficult problem.

2. Proposed section 385.22 needs further definition of "adequate legal representative" and "conflict of interest." Neither term has a self-evident meaning, and courts will need to know what they are supposed to be looking for in determining whether the action can proceed on behalf of the general public.

a. "Adequate legal representative" might be defined as being the same standard applied to determine whether a plaintiff can adequately represent the class, or it might be defined as showing sufficient knowledge, experience, resources and ability to prosecute the case vigorously on behalf of the class.

b. "Conflict of interest" will probably be much harder to define. But definition of that term is crucial because so many different notions of "conflict of interest" are used by lay people as well as lawyers

and judges. At the Law Revision Commission meeting I attended, Professor Fellmeth, I believe, suggested that a plaintiff would have a "conflict of interest" if the plaintiff pursued substantial causes of action on his or her own behalf as well as the 17200 claim on behalf of the general public. If that notion is correct, it certainly should be explained in the statutory language, since I do not believe many lawyers or judges would reach that conclusion just from the words "conflict of interest." Is a "conflict of interest" raised when the plaintiff has a significant personal financial stake in the outcome of the litigation, so that the plaintiff might be willing to bargain away the public's right for his or her personal gain? Does an organization like Consumers Union have a "conflict of interest" because it pursues goals that are broader than and perhaps different from simple success in the litigation so that it might be willing to settle a case to advance those goals at the expense of greater restitution or other relief in the case itself?

c. Should a court allow discovery regarding "adequate legal representative" and "conflict of interest" before making its determination?

d. The proposed statute should also address what effect the filing or "certification" of a representative action has on the statute of limitations for individual suits for damages. Under section 385.34(b), individual actions would not be barred by res judicata, but they might be barred by the statute of limitations if not filed while the representative action was pending. Perhaps, the statute of limitations should be stayed pending resolution of the representative action by analogy to the similar tolling of the statute of limitations for class members under certain circumstances. (See *Becker v. McMillan Construction Co.* (1991) 226 Cal.App.3d 1493.)

3. Proposed section 385.22 should also specify that when a court determines that a case cannot be maintained on behalf of the general public, the action is no longer a "representative action" for purposes of the remainder of the proposed new statute so that the notice and settlement provisions no longer apply. Alternatively, the definition of "representative action" in section 385.10 could be changed to exclude actions in which a determination has been made that the action cannot be brought on behalf of the general public.

4. Some thought should be given, and some language should be added, to specify the manner of appellate review of the determination that an action can or cannot be maintained on behalf of the general public. Is a determination that the action cannot be maintained on behalf of the general public to be treated as a "death knell" order, thus being immediately appealable as an order denying class certification? Or is the determination reviewable only by a petition for extraordinary writ prior to entry of final judgment? Or is some other review pattern desirable?

5. The statute should also specify whether the plaintiff will be allowed to obtain any ruling involving the merits (such as summary judgment or preliminary injunction) before obtaining a determination as to whether the action may be maintained on behalf of the general public. Generally, in class actions, certification must precede any ruling on the merits to avoid the problems of one-way intervention. (See *Home Sav. & Loan Assn. v. Superior Court* (1975) 54 Cal.App.3d 208; *Home Sav. & Loan Assn. v. Superior Court* (1974) 42 Cal.App.3d 1006.) For the same reason, the same rule should be adopted by statute for actions on behalf of the general public. There also should be some coordination of this concept with section 385.32 regarding preliminary injunctions.

6. Some thought should be given to coordinating the notice provisions of section 385.24 with notice requirements of other statutes that might govern claims a plaintiff would join with a 17200 claim in a single suit. For example, Proposition 65 requires pre-suit notice. When there are two notice requirements for two different claims in a complaint, must the plaintiff give two notices? Or will only one suffice?

7. Public prosecutors should be required to file a similar notice with the Attorney General so that private citizens will be notified of such suits. This will serve two important functions: First, it will tend to discourage duplicate filings of actions by private plaintiffs on behalf of the general public. Duplicate private suits may be eliminated later under section 385.40, but only after considerable expense to both sides, an expense that could be eliminated by simply requiring public notice of the public suit. Second, public notice will allow those affected by the alleged practice to monitor the public suit so as to preserve their rights against possible prejudice by a settlement benefiting the public prosecutor at the individual victim's expense, as in *People v. Superior Court (Good)* (1976) 17 Cal.3d 732.

8. Sections 385.28 and 385.30 (requiring public notice and findings before entry of judgment in a representative action) should be amended to make it clear that they apply only to judgments to be entered pursuant to settlement or voluntary dismissal. If the case goes to trial, public notice and findings are not needed to protect the public interest, and giving notice would serve no purpose since public comments post-trial would not change the judgment which the court has determined to enter, based on the law and facts adduced at trial.

9. Sections 385.28 and 385.30 should apply to 17200 actions brought by public prosecutors as well as to private representative actions. As *People v. Superior Court (Good)* (1976) 17 Cal.3d 732 illustrates, public prosecutors have their own agendas and interests that are not always the same as those of the victims of an unfair practice. The "county bounty" in particular gives public prosecutors an incentive to require the wrongdoer to pay the public treasury rather than victims. The notice and findings requirements of these sections would go a long way to assuring that the public prosecutor is properly looking out for the victims as well.

10. Under section 385.34(b), an individual would not be bound by the results of the representative action in seeking damages on his or her own behalf. By the same token, the individual should not be able to claim the benefits of collateral estoppel based on the results of the representative action. In the same way, persons who opt out of a class action are not bound by the judgment in the class action but cannot claim the benefits of collateral estoppel based on the class action judgment. (E.g., *Premier Elec. Constr. Co. v. National Elec. Contractors Assn.* (7th Cir. 1987) 814 F.2d 358.) The statute should expressly adopt this rule for representative actions to even the playing field.

11. Section 385.36 ought to be dropped. If the defendant wishes to bind individuals so that they cannot later file individual suits for damages, the law already provides a perfectly well understood and available means of doing so: a true class action. Rather than inventing a whole new scheme with new problems, the statute should simply allow the defendant to rely on the existing available remedy. If the plaintiff won't agree to joining a harmed plaintiff and getting a class certified, then there will be no settlement or the settlement terms will have to be modified.

12. I think section 385.40 unduly favors public prosecutors. It will be virtually impossible for a private plaintiff to make the showing required by

that section particularly since most of the facts (such as what resources and expertise the public prosecutor has) are solely within the public prosecutor's knowledge. Or is the private plaintiff able to conduct discovery as to those facts? Once again, "conflict of interest" requires definition. Is the "county bounty" a "conflict of interest"?

13. Section 385.42 should be redrafted to match Code of Civil Procedure section 1021.5 better. Section 1021.5 does not mention either "successful party" or "beneficial contribution" both of which are used in section 385.42(c). If private attorney general fees can be paid to private parties who are not "successful," is there any restriction on when fees can be awarded, or is the court free to award fees whenever it finds the private plaintiff has contributed something to the public suit? I think some greater hurdle to fee awards should be erected.

Sincerely yours,

Jan T. Chilton

PS. After I prepared this letter, I received a copy of the letter submitted on this proposal by Gail Hillebrand of Consumers Union. Much she has to say is helpful and constructive. Her suggestion that the Commission delete the sections regarding res judicata effect is not. Deleting the res judicata sections would gut the proposed legislation of its principal benefit, leaving unsolved the principal problem which was identified in Professor Fellmeth's study and which the legislation was intended to address. Mootness would not bar a second suit, as Ms. Hillebrand suggests, unless all available relief had been granted in the first suit, something that will not occur if the first suit is settled. Nor will the proposed legislation's limited stay of private representative actions help; it will only postpone the problem, and then only when the "first" suit is brought by a public prosecutor rather than another private plaintiff.

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September 27, 1995

California Law Revision Commission
BY FAX ONLY

Re: B & P 17200 & 17500 Revisions

Dear Commissioners:

I have worked as a DA consumer fraud prosecutor for four years and a private attorney general on 17200 issues for 15 years. Please consider the following comments in connection with the proposed changes in the unfair business practice laws.

COMMENTS ON STAFF DRAFT UNFAIR COMPETITION LITIGATION 9/8/95

Section 385.40 – Civil Penalties Distinguish Public From Private Prosecutor

Unmentioned in Memorandum 95-43 is probably the key to the difference in roles of the public and private prosecutors from a practical standpoint: the public prosecutor can get penalties which go into the public coffers; the private prosecutor can only get restitution. Both, of course, can get an injunction. The public prosecutor has an *inherent conflict* between an interest in putting money in the public coffers, which pays staff salaries, and restitution to the public. The cable television settlement in San Diego earlier this year, with which Bob Fellmeth was involved, is a good example of this conflict. The DA settlement money went into the county coffers and helped public schools. I don't think there was any restitution to the public. A class action is pending on the damages issue, but the DA certainly was not looking primarily for restitution to the public.

With this conflict in mind, when separate actions are filed the public prosecutor might be presumed to be the better representative with respect to injunctive relief in all cases and with respect to restitution relief in those cases where the public prosecutor does not seek a civil penalty. If the public prosecutor seeks a civil penalty, the private prosecutor should be presumed to be the better representative on the restitution issue. The cases should be coordinated with the private plaintiff's interest limited to the restitution issue rather than having the private case stayed.

The requirement that the public prosecutor is required to have a substantial conflict of interest is impossible to meet unless a provision is added that such conflict is presumed

to exist in any case where the public prosecutor seeks civil penalties for itself and restitution for the general public.

385.28 Notice of Terms of Judgment & 385.30 Findings Required

These provisions may not be a bad idea for a big case, but not all 17200 cases warrant such a cumbersome procedure. For example, I have just settled a small 17200 case against a Marin County title company involving a practice that went on for about a year ending in 1989. We have agreed to prospective relief of lowering fees for the title company's customers and attorney fees, which probably will be in the neighborhood of $30,000. The statute has run on other similar claims and if I thought there was enough money to be gained in restitution I would go to the trouble of doing it myself. These procedures in such a case would just be a big waste of time and money.

The procedures in these sections should be optional when one of the parties wants the preclusive effect they provide for. If the attorney general is given a copy of the complaint in the first place, then it could also mandate that these procedures be followed by motion. Making this procedure mandatory will just muck up the system without serving much purpose.

If notice is going to have to be given to regulatory agencies, defendant should be required to tell plaintiff which agencies regulate it.

385.26 Disclosure of Similar Cases Against Defendant

The way this is worded it does not provide the plaintiff with the information needed to meet the hearing notice requirements, even if the defendant complies. The defect in the wording is that the defendant is required to tell the *new* plaintiff about the old case, but is not required to tell the *old* plaintiff about the new one. When it comes time for the 385.28 and 385.30 notices, then, the plaintiff does not know about cases filed after the case giving notice was filed but before the notice goes out.

At the end of 385.2 language such as "and the defendant shall thereafter give notice to the plaintiff of any case filed for which defendant is required to give notice pursuant to this section of the pendency of this action" needs to be added.

385.22 Adequate Legal Representation

The statute does not define how the attorney becomes an "adequate legal representative." If the idea is to have the plaintiff's attorney meet the same requirements as if it was class action, why not just say so? There is plenty of law on that standard and no need to start a whole new bunch of cases on whatever is meant by this language.

385.34 Binding Effect of Representative Action

Unless the stay provisions of DA actions is changed as suggested above, this section can be dangerous. The DA action might give nothing to the class but still preclude any recovery on their behalf. In most such cases it is essentially impossible for individual members of the public to prosecute individual actions, so the ability to do so is meaningless. At a minimum this section should only apply to DA cases when there has been an order of restitution and the court has made a finding that a private action seeking damages and restitution would likely not have obtained more restitution damages for the class than the DA case.

12660 Establishment of representative action register

This is not a bad idea, if it is really kept up and provides meaningful information. I was involved in a statewide effort in the late 70's to have a computerized database of complaints, but we found that it was not really a useful idea because prosecutors did not make use of the information. I suspect that the AG won't really pay much attention to such a register and it will founder. Maybe a limitation such as only actions that affect persons in at least three counties and 10,000 people or something would limit the list to cases that people really cared about.

I have a prior commitment at 2:00 PM but will attempt to appear at your meeting on Thursday the 28th by 3:00 PM in the hope you are still considering this matter. Thank you for your consideration of my thoughts.

Very truly yours,

S. Chandler Visher